SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923, No. 607.

STANDARD OIL COMPANY (NEW JERSEY),
Petitioner,

AGAINST

THE SOUTHERN PACIFIC COMPANY AND JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a proceeding for limitation of the liability of Standard Oil Company (N. J.), as owner of the steamship *Cushing*, with which has been consolidated the proceeding for limitation of liability by the Southern Pacific Company, as owner of the steamship *Proteus*, and the Director General of Railroads, who was in possession of the *Proteus* under the Act of August 29th, 1916, and the proclamation of the President of December 26, 1917, at the time of the collision between the *Cushing* and the *Proteus*. The collision occurred August 19, 1918, and resulted in the sinking and total loss of the *Proteus*.

The District Court for the Southern District of New York (L. Hand, *J.*) held both vessels in fault and referred the question of damages to a commissioner, who found the value of the *Proteus* at the time of the collision to be $750,000. Mack, *C. J.*, confirmed the report,

and a final decree was entered apportioning the damages, giving the owners of the cargo a full recovery, and striking a balance in favor of the Southern Pacific Company and the Director General of Railroads of $200,448.89, "being one half of the difference between the amount of their damages * * * interest * * * and costs, and the damages sustained by Standard Oil Company (N. J.) as owner of the *Cushing* with interest * * * and costs, including the amount paid by the Standard Oil Company (N. J.) to the cargo claimants" (Record, Vol. I, fols. 2692-3).

The Circuit Court of Appeals affirmed the decision on the merits, and increased the value of the *Proteus* to $1,225,000, which, on the apportionment of damages, would give the Southern Pacific Company and the Director General of Railroads a recovery of about $500,000.

I. No novel or important question of law is involved in this application.

The only question raised is the value of the *Proteus*.

All the witnesses on both sides adopted the same method of determining value, viz., the cost of reproduction less 18 years' depreciation. This is the method adopted by this Court in the rate-making cases, *Knoxville* vs. *The Knoxville Water Company*, 212 U. S. 1, and *Denver* vs. *Denver Water Company*, 246 U. S. 178. In the latter case Mr. Justice Pitney said:

"What we have said establishes the propriety of estimating complainant's property on the basis of present market value as to land, and reproduction cost, less depreciation, as to structures" (p. 191).

The claimant's witnesses were Martin, a marine surveyor and appraiser of more than 35 years' experience, who was a member of the Ocean Advisory Board on Just Compensation (1586), Smith, President of the New York & Cuba Mail Steamship Company (Ward Line) (1636), and Raymond, President of the Clyde and Mallory lines (1758). Their valuations ranged from $1,225,000 to $1,350,000 (Commissioner's report, 2507, 2513, and 2515).

The petitioner's witnesses were Morrell, employed in the Construction Department of the Standard Oil Company (1829), Gillmor, a naval architect and member of the Joint Merchant Vessel Board, which appraised vessels that might be requisitioned by the Government (1891-1900 and 1949 and 1951), and Swasey, vice-president of Hereshoff Manufacturing Company (2045). Their valuations ranged from $611,000 to $630,000 (Commissioner's report, 2520, 2525 and 2528).

The difference in the estimates of the two sets of witnesses was due either to a different replacement cost or a different rate of depreciation or both. The witnesses for the *Proteus* took the replacement cost as $1,750,000. Mr. Palen, vice-president of the Newport News Company, gave the precise cost of reproduction as $1,755,450 (2127-8).

Morrell, for the petitioner, started with $1,670,000 as the cost of reproduction (1850-2) and used a depreciation rate of 4% for 14 years and 2½% for four years (1853). Gillmor conceded that reproduction less depreciation was a correct rule (1936, 1937) and said that "2½ times the first cost would be a liberal reproduction cost of the *Proteus*" (1943). This would make the reproduction cost

$1,375,000, and he fixed her value at .452 of this cost in accordance with a table which he had used in appraising vessels of various ages. Swasey thought $1,400,000 "about right" as a replacement value and using the same table as Gillmor "depreciated the price to $611,000" (2058-9).

The *Proteus* witnesses adopted 2½% to 3% as a fair and reasonable rate of depreciation, taking into consideration the extraordinarily high standard of up-keep maintained by the Southern Pacific Company for its vessels (Martin, 1609 and 1622-5; Raymond, 1791; Smith, 1671).

The difference between the conclusion of the Commissioner and Judge Mack on the one hand and that of the Circuit Court of Appeals on the other, is that the Circuit Court of Appeals regarded the estimates of Martin, Raymond and Smith as more weighty than those of the petitioner's witnesses. In the District Court the learned Circuit Judge conceded that "the cost of reproduction less depreciation has been commonly adopted as a standard for rate-making purposes" (2568), but he noted a recent "tendency among legal and economic writers to bring to the fore the prudent investment standard" (2569). He did not, however, follow this out, but contented himself with *discounting* "the cost of reproduction" (2574).

The Circuit Court of Appeals said:

> "We think the greater weight of persuasive testimony favors the proof offered on behalf of the *Proteus* as to value and that the rate of depreciation was fair and reasonable under all the circumstances" (Opinion).

Thus it is evident that there is no novel or important question of law raised by this application. It may seem startling that a vessel which cost less than $600,000 in

1900 should be worth $1,225,000 eighteen years later, but that was what happened all over the world during the war. An interesting example of increased values is the case of the *Havana* and *Saratoga,* two steamships of the Ward Line built in 1906 at a cost of $900,000 each (Smith, 1651, 1654-5) and appraised in 1917 by the Joint Board, of which the petitioner's witness Gillmor was a member, at $2,240,000 each and paid for at that rate by the Government (1653-7).

II. THERE IS NO MERIT IN THE PETITIONER'S CONTENTION THAT THE SOUTHERN PACIFIC COMPANY IS BARRED FROM RECOVERY IN CASE IT HAS MADE A SETTLEMENT WITH THE DIRECTOR GENERAL OF RAILROADS.

The petitioner's argument is that the Southern Pacific Company is "the innocent injured party seeking only to recover for the value of the *Proteus*" (Brief, p. 29); that the Standard Oil Company and the Director General of Railroads were "joint tort feasors causing the loss of the Southern Pacific Company's steamer *Proteus*" (Petition, p. 5; Brief, p. 30); that "it has come to the attention of counsel in this case, through proper and reliable sources, that a final settlement had been arrived at between the Railroad Administration and the Southern Pacific Company by which the liability of the Railroad Administration for the loss of the *Proteus* has been finally satisfied and extinguished by a payment, credit or adjustment, on the basis of the value found by the Commissioner and confirmed by the District Court, namely, $750,000" (Petition, pp. 5-6); and that "the claim which it may have had for the same loss against the other tort feasor, Standard

Oil Company (New Jersey) has thereby been extinguished" (Brief, p. 30).

"Naturally the facts just noted are not included in the record on appeal here" (12th article of the Petition, p. 7).

The petitioner naively asks for a writ of *certiorari*, not merely on the grounds usually stated in such applications, but for the reason that "the peculiar circumstances which have arisen during the pendency of this litigation * * * justify a further inquiry into the facts, to determine their legal effect, and their bearing on the measure of damage for which your petitioner may be liable" (Petition, p. 11).

1. A writ of *certiorari* brings up the record, and nothing outside the record. *Harris* v. *Barber*, 129 U. S. 366; *McClellan* v. *Carland*, 217 U. S. 268.

2. The statements of the petition and brief *dehors* the record do not sustain the petitioner's contention as to the relation of the parties.

It is certainly a fantastic suggestion that the owner as an innocent party was dealing with the Director General as one of two joint tort feasors.

If the Southern Pacific Company is "an innocent party" then it must be in the same situation as the owners of cargo and entitled to a decree for the full amount of its damages as against the petitioner.

3. The relations of the Southern Pacific Company and the Director General *inter se se* are no concern of the petitioner. At any time in the course of the litigation, before or after judgment, the Director General of

Railroads could have settled his contractual obligations to the Southern Pacific Company in any way that they might see fit, and either the Southern Pacific Company or the Director General, in making a settlement, might reserve its rights as against the Standard Oil Company.

The petitioner has not even asserted that the Southern Pacific Company released the Director General of Railroads.

4. The relations between the Southern Pacific Company and the Director General did not arise out of tort, but were contractual.

The taking of the Southern Pacific system of transportation under the Act of August 29, 1916, was subject to just compensation being made, and the President's proclamation of December 26, 1917, expressly provided that the Director General should

"enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use and control of their respective properties * * *".

Also, the Federal Control Act of March 21, 1918, provided for just compensation to the carriers and for the making of agreements therefor between the President and the carriers. In Section 1 of this Act it was contemplated

"that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control * * *".

Pursuant to this statute the Director General and the Southern Pacific Company made an agreement which was

put in evidence by the petitioner's counsel, February 3, 1921 (Record, p. 681).

In Section 5(*e*) of this contract it was provided:

"If, during Federal control, any of the property described in paragraph (*a*) of section 2 hereof [this included the *Proteus*] or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire or marine casualty, or any of the floating equipment described in paragraph (*a*) of section 2 hereof is destroyed or damaged by war risks while in ocean waters outside of the three-mile limit, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss, and the cost of restoration or replacement or said value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (*a*) of this section."

The Director General was bound by contract to make compensation to the Southern Pacific Company for the loss of the *Proteus,* and whether he was negligent or not had nothing to do with his obligations toward the Southern Pacific Company.

5. The petitioner has failed to make out a case for extraordinary relief.

It had known the relations of the Director General and the Southern Pacific Company since they filed their petition for limitation of liability July 21, 1919 (98). On the hearing before the Commissioner December 7, 1920 (1582 and 1630), counsel for the petitioner sought to ascertain whether a settlement had been made with the Government. It knew that a settlement was inevitable by virtue of the statutes of the United

States and the contract made between the Director General and the Southern Pacific Company dated February 19, 1919, which the petitioner put in evidence February 3, 1921, and which contained the provision quoted *supra*.

The petitioner was further put on notice by Mack, *C. J.*, in his opinion confirming the Commissioner's report. Referring to the relations of the Southern Pacific Company and the Director General he said:

"The claimant and the Director-General, I assume, have come or will come to an agreement regarding their respective rights as to the interest accruing during the period of requisition. Unless some agreement has been reached, I assume that the Government is entitled to the interest during the period of requisition, and the claimant to its agreed compensation" (2584).

III. THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

October, 1923.

CHARLES C. BURLINGHAM,
Counsel for Southern Pacific Company
and the Director General of Railroads.

[redacted]

SUPREME COURT OF THE UNITED STATES

STANDARD OIL COMPANY (NEW JERSEY), Petitioner, AGAINST SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, Director General of Railroads, Respondents.	No. 607 October Term, 1923

BRIEF FOR RESPONDENTS IN OPPOSITION TO MOTION FOR LEAVE TO TAKE NEW EVIDENCE

This application is for an order (*a*) giving the petitioner leave to take additional evidence in this Court; (*b*) appointing a commissioner to take such evidence orally (Motion Papers, p. 2).

I. THE MOVING PAPERS ARE DEFECTIVE IN THAT THEY FAIL TO STATE (1) PRECISELY WHAT THE PETITIONER WISHES TO PROVE; (2) THE NAMES OF THE WITNESSES TO BE EXAMINED.

The petition for *certiorari*, which is quoted at length in the moving affidavit, alleges that

"it has come to the attention of counsel in this case, through proper and reliable sources, that a final settlement has been arrived at between the Railroad Administration and the Southern Pacific Company by which

the liability of the Railroad Administration for the loss of the *Proteus* had been finally satisfied and extinguished by a payment, credit or adjustment on the basis of the value found by the Commissioner and confirmed by the District Court, namely, $750,000" (Motion Papers, p. 8).

Yet the affiant states that "the petitioner is not in a position to draw up written interrogatories dealing with the matters mentioned in the above quotation from the *certiorari,* which it wishes to bring out as an addition to the record herein" (Article VII, Motion Papers, p. 11).

And further—

"The petitioner does not know, and this deponent as its counsel has been unable to find out with definiteness, just what procedure was followed in connection with the settlement * * * in respect of the value of the steamship *Proteus.* Until the evidence has been somewhat developed, counsel for the petitioner cannot even be certain just what witnesses will have to be examined. It will of course be necessary to examine the Director General of Railroads and some of his employees, but who those employees are counsel does not know. It will probably be necessary also to examine officers or employees of the Southern Pacific Company at New York, whose identity is not known to the petitioner or this deponent, and which can be discovered only by means of the procedure that would become available before a Commissioner appointed by this Court" (pp. 11-2 of the Moving Papers).

The inconsistency of these statements is striking. If the petitioner's counsel has learned "through proper and reliable sources" facts which he wishes to prove, he should be able to name his witnesses now.

If, however, the petitioner did not have material information through "proper and reliable sources" and his petition for certiorari was merely to prepare the way for a roving commission or fishing expedition, it would seem that the writ should be dismissed now. *Furness Withy & Co. Ltd.* v. *Yantsze Insurance Association,* 242 U. S. 430;

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508.

There is nothing in the circumstances of this case to justify the petitioner in disregarding the rules and practice of this Court. Subdivision 2 of Rule XII of the General Rules points out specifically the method in which new evidence on an appeal in admiralty must be taken. It provides that such evidence shall be taken upon interrogatories to be filed by the applicant with notice to the opposite party, "accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice".

This rule was adopted in 1817 (2 Wheat. vii), and from that time to this, so far as we can ascertain, no testimony has been taken in this Court in admiralty appeals either *viva voce* or by open commission.

Even in a case of original jurisdiction (*State of New Mexico* v. *State of Texas*—April 14, 1924) this Court, in granting a motion to take additional testimony of a witness named, required the testimony "to be limited to the subject matter detailed in his affidavits".

II. THE TESTIMONY SOUGHT TO BE OBTAINED IS WHOLLY IMMATERIAL.

The petitioner seeks to take testimony to prove a settlement between the Southern Pacific Company and the Director General of Railroads in order that it may invoke the rule that a settlement by a third party with one of two joint tort feasors releases the other joint tort feasor. But the rule which the petitioner would invoke has no application to this case.

As pointed out on pages 3 and 4 of the moving affi-

davit herein, the transportation system of the Southern Pacific Company, including the steamship *Proteus*, was taken into the possession and control of the Director General, pursuant to the Act of Congress of August 26, 1916, and the Proclamation of the President of December 26, 1917. The Southern Pacific Company thereupon became entitled to just compensation for the property so taken by the United States by eminent domain. By the Federal Control Act of March 21, 1918, certain principles were laid down with regard to the method of arriving at just compensation, and by the President's Proclamation of March 29, 1918, the Director General was authorized to enter into agreements with carriers as to such just compensation. Such an agreement was entered into between the Director General and the Southern Pacific Company.*

By the "Transportation Act, 1920", Section 202, the President was directed "as soon as practicable after the termination of Federal control" to "adjust, settle, liquidate, and wind up all matters, including compensation, and all questions and disputes of whatsoever nature, arising out of and incident to Federal control". The petitioner's position is that a settlement pursuant to that statute between the Southern Pacific Company and the Director General, acting for the President, operates to relieve the petitioner from all liability whatsoever for its negligence in sinking the *Proteus*.

From the time the Director General assumed control the Government held the property, not as a demise charterer, as the petitioner suggests (p. 4), but by eminent domain, as is shown by *Du Pont De Nemours & Co.* v. *Davis*, decided by this Court April 7, 1924, and *North Carolina*

* The agreement was offered in evidence by petitioner's counsel and is marked "Petitioner's Ex. 1, 2/3/21, G. J. Z." (Record, Vol. 2, p. 681). As it was omitted from the record, we annex to this brief an abstract of it, marked "A".

R. R. v. *Lee,* 260 U. S. 16. In the latter case this Court said:

"The Government operated this railroad not as lessee, but under a right in the nature of eminent domain."

And this relation was not changed by the fact that an agreement was reached as to the method of arriving at just compensation.

The right of the Southern Pacific Company to just compensation, as fixed by contract, was its only right against the Director General in respect of its property taken over by him. The Director General assumed complete possession and control and owed the Southern Pacific Company no duty as to the manner of use of the property. His only obligation was to make proper compensation.

It is well settled that where property is taken by eminent domain, with due formalities, the owner of the property cannot sue the taker in tort, but is limited to his remedy for compensation.

With respect to the Southern Pacific Company the Director General committed no tort, no matter how negligently his employees may have operated the *Proteus,* and, therefore, the Director General was not a tort feasor at all with respect to the Southern Pacific Company.

Even if it be assumed that one who has taken property by eminent domain may still owe a duty to the owner as to the manner of use of that property, the Director General could not be sued in tort, for he was but an arm of the United States, and the immunity of the sovereign was waived only to the extent of "liabilities ordinarily incident to the operation of carriers", *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, 559. It was only as to third parties dealing with the Director General as a common carrier that the bar of the sovereign's im-

munity was let down. As to all others, including the Southern Pacific Company, it remained.

Any settlement to bring into operation the rule the petitioner invokes must be of an obligation that is necessarily tort. It is not enough that the obligation *might* be tort.

Even if the Director General were liable in tort to the Southern Pacific Company that company could disregard the tort and rely upon its right to just compensation for the loss of the *Proteus*. Any tort claim that the Southern Pacific Company might have had against the Director General was clearly waived or turned into a contract liability when on February 19, 1919, *after the loss of the Proteus* on August 19, 1918, it made its contract with the Director General. By that contract he agreed to make good the loss of the property destroyed by "marine casualties" defined as "casualties covered by the usual marine insurance policy including collision clause", and the Southern Pacific Company accepted the "obligations of the Director General in this agreement * * * in full adjustment, settlement, satisfaction, and discharge" of all claims for compensation and "for the use, control, and operation" of the property during Federal control (Appendix A, Sect. 5).

In any event the petitioner and the Director General were not *joint* tort feasors. It is true that the negligence of the Director General contributed with that of the Standard Oil Company to the collision, but it does not follow that the parties were *joint* tort feasors. Persons are not *joint* tort feasors merely because their acts have contributed to a single damage. There must be some unity of interest, common design, purpose or concert of action—"they must in fact or in law have committed the same wrongful act" (Salmond's Law of Torts, p. 70).

The most recent decision on this point dealing with collisions is that by the English Court of Appeal in the *Koursk*, decided February 22, 1924, reported in 40 Times Law Reports, 399.

Lord Justice Bankes said:

"It is no doubt quite common to speak of each of two separate tortfeasors as joint tortfeasors in the sense that where each has contributed to the injury complained of each is liable for the whole of the damage done. In my opinion, the use of the expression in such circumstances is inaccurate and misleading."

Lord Justice Scrutton stated the negligence briefly as follows:

"The negligence of the *Koursk* consisted in deviating from her convoy course into the track of the *Clan Chisholm*. The negligence of the *Clan Chisholm* consisted in not reversing her engines when she saw the *Koursk* out of her course."

He then said:

"The two negligences were separate and independent, not taken in concert, or as part of a common plan, and both, in the view of the House of Lords, contributed to the collision."

His conclusion was:

"In my view the *Koursk* and the *Clan Chisholm* were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts."

As to the definition of joint tortfeasors he said:

"I am of opinion that the definition in Clerk and Lindsell on Torts (7th edn., at p. 59) is much nearer the correct view: 'Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design."

This was apparently the view of Judge Addison Brown in the *Hudson,* 15 Fed. 162, where he refers to the fact that in collision cases

"the acts of the two vessels for which they are held liable are not joint, but wholly separate and independent of each other; each vessel being held liable solely on account of its own act of negligence" (p. 168).

Here the *Proteus* was held in fault for hard-aporting her helm; for not signalling her extreme helm movement, and for persisting at full speed ahead (Opinion, Vol. 2, fol. 2755): the *Cushing* for not flashing on her lights, and for failing to give the *Proteus* a wider berth (Opinion, Vol. 2, fol. 2759). These were entirely separate and independent acts of negligence, without common design, or the opportunity for common design.

The rule the petitioner invokes applies only where a settlement is made by a third party, not in privity with either of the wrongdoers. The Southern Pacific Company was not a third party. Between it and the Director General there was a certain privity. There was the relation that exists between the owner and the taker of property by eminent domain. There was privity of contract, and both parties are the joint owners of a judgment against the petitioner. The rule invoked does not apply where there is privity between the parties to the settlement.

In case of collision due to mutual fault the cargo owner is ordinarily barred from recovering from the carrying vessel by the exceptions of the bill of lading. Could it be contended that the cargo owner by accepting a bill of lading releasing the carrying vessel from liability for errors in navigation thereby releases the other colliding vessel? Such is the logical result of the petitioner's argument.

The *Proteus* was a total loss. Her underwriters could have brought suit in their own names. *Liverpool and Great Western Steam Company* v. *Phenix Insurance Company,* 129 U. S. 397. Furthermore, the recovery here includes not only the loss of the hull of the *Proteus,* but also claims of passengers, crew and cargo (Final decree, Record, Vol. 2, pp. 888-896).

It is, therefore, obvious that the true alignment of the parties is not as the petitioner suggests, namely, that the Southern Pacific Company has a claim against two joint tort feasors, the Standard Oil Company and the Director General, but rather that the Director General and the Southern Pacific Company together had a claim against the Standard Oil Company which they held as trustees for hull underwriters, cargo owners, members of the crew, etc. These beneficiaries should not be prejudiced by any transactions between the Southern Pacific Company and the Director General. *The Beaconsfield,* 158 U. S. 303.

The petitioner alleges that the settlement was made between the time of the decision of the District Court and that of the Circuit Court of Appeals (Motion papers, p. 8). We know of no authority holding that if the third party settles with one of two joint tort feasors *after trial and judgment,* such settlement may be made a basis for opening up the judgment and claiming that such settlement, subsequent to trial, releases the other party.

Whatever claim the Southern Pacific Company had against the petitioner was merged in the judgment. If the Southern Pacific's claim against the Director General was in tort, as petitioner asserts, the settlement of such tort claim would not operate to release a *judgment* which the Southern Pacific Company has against another person.

The petitioner's argument carries it no further, in any event, than that the Southern Pacific Company could not recover from the petitioner. It does not follow from the "joint tort feasor" rule, if applicable, that the *Director General* is precluded from recovering from the petitioner.

The petitioner also urges as a ground for leave to take additional testimony that the Southern Pacific Company should not be allowed to claim from the petitioner "more than it has agreed with its demise charterer, the Railroad Administration, as the value of the *Proteus,* and the basis of its damages for the loss of the *Proteus* through that charterer's fault" (p. 9).*

This argument apparently proceeds upon the assumption that the judgment against the petitioner is merely one by the Director General for indemnity, and that, therefore, he should not recover from the petitioner more than he has paid the Southern Pacific Company.

But the judgment here is not one in favor of the Director General for indemnity but is upon the claim of the Southern Pacific Company and the Director General, owner and special owner of the property, respectively. Together they represent the full ownership and interest in the property and are entitled to claim the full value of the property from the third party, the petitioner, irrespective of the contractual or other relations between themselves.

As was said by Wallace, *J.,* in the *Jersey City,* 51 Fed. 527:

"Either the bailee or the bailor may maintain an action against a tort-feasor who injures the property while in the custody of the bailee, and recover the full damages; * * * If, say the court, in *White* v. *Cobb,* 'the suit is

* Whether the petitioner was at fault or not is immaterial. The Director General's obligation to make good in case of loss through collision was absolute as already pointed out.

brought by a bailee or special property man against the general owner, then the plaintiff can recover the value of his special property; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest in trust for the general owner."

And as pointed out in 2 Bevan on Negligence, 737:

"The bailee, although not liable to the owner, may sue a third party, who has either injured or converted the property, and recover its full value or the full amount of the damage sustained."

This rule has been frequently applied in mail cases, where the United States has been allowed to recover the full value of the property even though it was under no obligation to make good to the sender. *National Surety Co.* v. *U. S.*, 129 Fed. 70; *U. S.* v. *American Surety Co.*, 161 Fed. 149.

In *U. S. Fidelity & Guaranty Co.* v. *U. S.*, 229 Fed. 397, and in *U. S.* v. *U. S. Fidelity & Guaranty Company*, 247 Fed. 16, the United States was allowed to recover the full value of the registered package, although its liability was for only $50.00 per package.

Could it be contended that because a shipper had taken a bill of lading with an agreed value clause (say $100 per package) he would thereby be precluded from recovering from a vessel colliding with the carrying vessel more than $100 per package. Obviously, the other colliding vessel could not avail itself of the agreement as to value between the shipper and the carrying vessel. Nor could the other vessel take advantage of the agreed value, even though the shipper settled with the carrier on the basis of the agreed value.

That situation is not unlike the one presented here.

Inasmuch as the evidence which the petitioner hopes to secure would be immaterial on the appeal the motion prayed for should be denied.

III. THE PETITIONER HAS FAILED TO MAKE OUT A CASE FOR THE EXTRAORDINARY RELIEF PRAYED FOR.

The petitioner knew the relations of the Director General and the Southern Pacific Company from July 21, 1919, when they filed their petition for limitation of liability (Record, Vol. 1, p. 33). The petitioner knew, or is chargeable with knowledge since 1920, that under Section 202 of the Transportation Act, 1920, the President was directed "as soon as practicable" to

"settle" etc. "all matters and * * * disputes * * *, arising out of or incident to Federal control."

Federal control terminated March 1, 1920. The matter of settlement had been brought to the petitioner's attention on or before December 7, 1920, for at the hearing before the Commissioner on that day the petitioner's counsel asked

"whether or not there has been any settlement as between the Government and the owners of the loss of the *Proteus*" (Record, Vol. 2, fols. 1582, 1630).

The petitioner was further put on notice by Mack, *C. J.*, in his opinion confirming the Commissioner's report. Referring to the relations of the Southern Pacific Company and the Director General, he said:

"The claimant and the Director-General, I assume, have come or will come to an agreement regarding their respective rights as to the interest accruing during the period of requisition" (Record, Vol. 2, fol. 2584).

On February 3, 1921, when the petitioner offered in evidence its Exhibit 1 of that date, the agreement between the Director General and the Southern Pacific Company, the petitioner knew that the Southern Pacific Company had accepted "the covenants and obligations of the Di-

rector General in this agreement * * * in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights * * * otherwise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation * * * and for the use, control and operation" of the property during Federal control."

No reason has been suggested why petitioner could not have obtained the same information before as after the appeal was argued in the Circuit Court of Appeals.

In *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, this Court held that the Circuit Court of Appeals had properly refused to allow the case to be re-opened for the purpose of taking newly discovered evidence where there was lack of diligence on the part of the applicant. This Court referred to the

"most salutary rule of law which after parties have had a full and fair opportunity to prepare their case, refuses to permit them to drag out litigation by bringing in new evidence which with due diligence they ought to have discovered before the hearing. The apparent hardship of particular cases should not and can not weigh against the application of this sound principle" (p. 425).

IV. THE MOTION SHOULD BE DENIED AND THE WRIT DISMISSED.

Dated, April 25, 1924.

CHARLES C. BURLINGHAM
RAY ROOD ALLEN
A. HOWARD NEELY
Counsel for Respondents

A

ABSTRACT OF AGREEMENT BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE SOUTHERN PACIFIC COMPANY AND OTHER CORPORATIONS.

The agreement, "made" February 19, 1919, is "between Walker D. Hines, Director General of Railroads, • • • *acting* on behalf of the United States and the President under the powers conferred by the proclamations of the President," and the Southern Pacific Company and ten other affiliated companies.

PREAMBLE AND RECITALS

The agreement recites:

(*a*) The President's proclamation of December 26, 1917, and the taking over of the railroads and systems of transportation of the companies;

(*b*) The Federal Control Act of March 21, 1918, authorizing the President to enter into agreements with the companies;

(*c*) The President's proclamation of March 29, 1918, authorizing the Director General to agree with the carriers on the compensation to be paid for the use of their properties;

(*d*) The President's proclamation of January 10, 1919, authorizing Director General Hines to make agreements in connection with Federal control;

(*e*) and (*f*) The certification to the President by the Interstate Commerce Commission of the average annual operating income of the companies, computed as provided in Section 1 of the Federal Control Act;

(*g*) The fact that the companies operated a line of steamships between New York and Gulf ports, and that certain steamers named had been requisitioned by the Government before Federal control, and it was therefore doubtful whether they were taken over under the President's proclamation of December 26, 1917.

SECTION 1.—PRIVITY, ALTERATIONS, DEFINITIONS, ETC.

SECTION 2.—PROPERTY TAKEN OVER

Under this section the steamship *Proteus* was described as one of the passenger and freight steamers taken over.

SECTION 3.—ACCEPTANCE

"(*a*) The companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said Act * * *; and they further expressly accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction, and discharge of any and all claims and rights, at law or in equity, which they or any of them now have or hereafter can have, otherwise than under this agreement, against the United States, the President, the Director General, or any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation."

SECTION 4.—OPERATION AND ACCOUNTING DURING FEDERAL CONTROL

SECTION 5.—UPKEEP

This section provides that the Director General shall expend and charge to operating expenses such sums for maintenance, repair, etc., of the property "as may be requisite in order that such property may be returned to the Companies at the end of Federal control in substantially as good repair and in substantially as complete equipment as it was on January 1, 1918."

"If, during Federal control, any of the property described in paragraph (*a*) of Section 2 hereof" (which includes the *Proteus*) "or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire or marine casualty * * * he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss * * *."

"The words 'marine casualty' are used herein as applying to floating equipment and as meaning casualties covered by the usual marine insurance policy including collision clause * * *."

SECTION 6.—TAXES

SECTION 7.—COMPENSATION

This provides for the annual compensation guaranteed to the Companies under Section 1 of the Federal Control Act, namely, $47,959,898.08, and pro rata for each fractional part of a year of Federal control, subject, however, to any increase or decrease in the standard return hereafter made by the Commission," as provided in the preamble, and for payment thereof quarterly

SECTION 8.—CLAIMS FOR LOSSES ON ADDITIONS, ETC.

This section provides for additions, betterments, etc., during Federal control and for the settlement of any claims by the companies for loss accruing by reason of expenditures for such additions and betterments.

SECTION 9.—FINAL ACCOUNTING

"(*a*) At the end of Federal control all the property described in paragraph (*a*) of section 2 hereof shall be returned to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern, * * *"

SECTION 10.—AGREEMENT NOT TO AFFECT RIGHTS INVOLVED IN CERTAIN LITIGATION

This refers to the pending suit of the United States against the Southern Pacific Company for dissolution of the control of the Southern Pacific Railway over the Central Pacific Railroad.